No. 580

In the Supreme Court
of the United States

OCTOBER TERM, 1942

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, deceased,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the United States Circuit Court of Appeals for the Ninth Circuit.

FRANK C. HANLEY,
1508 Yeon Building,
Portland, Oregon,
Attorney for Petitioner.

ROY F. SHIELDS,
Pittock Block,
Portland, Oregon,
HARMBLEN, GILBERT & BROOKE,
Paulsen Building,
Spokane, Washington,
Attorneys for Respondent.

STEVENS-NESS LAW PUB. CO., PORTLAND

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PETITION FOR WRIT OF CERTIORARI

Your petitioner, Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, deceased, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was commenced by petitioner in the District Court of the United States for the Eastern District of Washington to recover damages for pain and suffering by and death of her husband, Leyle F. Owens, under the Federal Employers' Liability Act.

Decedent was employed by the Union Pacific Railroad Company as an engine foreman and on February 16, 1939, while engaged in participating in switching cars in the performance of his duties in defendant's yards at Spokane, Washington, two cars with the engine attached were kicked or pushed onto him by defendant's enginemen and other employees while their view of him was obstructed on account of the cars and curve in the track, without receiving any signal from him or giving him any warning, as he was crossing the track in front of the cars after throwing a switch, apparently proceeding to a point where he could give a signal that could be seen, for the movement of the engine and cars, as was the custom and practice (R. 108-114; 92, 93; 89-92; 95-99) and later to assist in picking up another car on the Pendleton track to the north and in the direction he was walking (R. 71) as instructed by his superior officer, the yardmaster (R. 181, 200-201). When the cars were pushed onto decedent as aforesaid, he was knocked down and run over by them inflicting mortal injuries from which he died about two and one-half hours later.

It is admitted by defendant that the following Rule 30 contained in its Book of Rules was in full force and effect:

> "30. Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds."

The evidence adduced by plaintiff, which will later be referred to, showed that the proximate cause of Mr. Owens' death was the negligence of the defendant. The following particulars were alleged in plaintiff's Complaint:

> "(a) That defendant and defendant's employees carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars; which said lookout was the custom and practice known to and adopted by defendant;
>
> (b) That defendant and defendant's employees carelessly and negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent;
>
> (c) that defendant and defendant's yardmen carelessly and negligently failed and neglected to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars; the receipt of which said signal was the custom and practice known to and adopted by the defendant;
>
> (d) that defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars or when same were about to move."

Evidence of a number of witnesses ,principally defendant's employees responsible for the switching operation, was offered and received to establish that at the time the cars were being switched there was a practice and custom in the yards to look out for each other, including plaintiff's decedent, and ascertain his whereabouts before moving the cars, and that no one, including yardman Koefod who gave a kick signal to the engineer, ascertained where decedent was before giving such signal. Evidence was further received that it was a practice and custom to receive a hand or other signal from Mr. Owens, who was in charge of the crew, before signaling defendant's engineer to kick or move the cars (R. 108-114; 92-93; 89-92; 95-99) and that undisputedly no such signal was received from Mr. Owens at the time. There was further evidence, which was undisputed, that defendant's engineman who had complete control of the operation of the engine and the ringing of the bell (R. 199-200) that they failed to ring the bell of the engine before moving the engine and cars or when the same were about to move (R. 138) as provided by Rule 30 hereinbefore referred to.

Respondent in its pleadings admit that plaintiff's decedent was at the time of his death employed by the defendant as an engine foreman and that he was killed in the course of his employment for defendant and at the time of the accident causing his death was engaged in assisting in moving and switching cars with the engine attached (R. 3, 11) which contained

shipments of interstate commerce, then denied negligence and further alleged and offered some evidence which it claimed showed that Mr. Owen's death was caused by his own negligence in stepping in front of the moving cars and likewise that in stepping on the track in front of the cars which were about to be moved that he assumed the risk of being struck thereby.

This case was based upon and tried in the United States District Court for the Eastern District of Washington under the Federal Employers' Liabilty Act the parts of which apply to the instant case being as follows:

(a)

Liability for Injuries to Employees

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves. or other equipment."

Section 51, Chapter 2, Title 45, U.S.C.A.

(b)

Contributory Negligence

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 53, Chapter 2, Title 45, U.S.C.A.

(c)

Assumption of Risk

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 54, Chapter 2, Title 45, U.S.C.A.

(d)

Survival of Right of Action of Person Injured

"Any right of action given by this chapter to a person suffering injury shall survive to his or

her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Section 59, Chapter 2, Title 45, U.S.C.A.

The jury returned a verdict in favor of petitioner for $10,000.00 on the 23rd day of April, 1941, upon which judgment was entered in the trial court on the same date for such amount (R. 247-248).

Motion for judgment *non obstante verdicto* and motion for new trial were overruled by the District Court on the 13th day of June, 1941 (R. 252-253).

Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit which in a judgment dated August 5, 1942, reversed plaintiff's cause (See opinion of court R. 268; 129 Fed. (2d) 1013). Petition for rehearing was denied on September 14, 1942 (R. 276).

Jurisdiction of This Court

The jurisdictional statute upon which your petitioner relies to invoke the jurisdiction of this Court is Title 28, Section 347 U.S.C.A. (Judicial Code Section 240) of the United States. Your petitioner claims that her rights under the Federal Statutes and especially the Federal Employers' Liability Act, parts of which are heretofore quoted have been denied by

the United States Circuit Court of Appeals for the Ninth Circuit, and that the same is in conflict therewith and with applicable decisions of this Court and decisions of Courts of Appeals of other Circuits as hereinafter more specifically stated.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals was in error in holding that petitioner's decedent as a matter of law had assumed the risks and dangers of his employment and in setting aside the verdict of the jury on this question in the face of the record which clearly showed by a preponderance of the evidence that the direct and immediate cause of the accident was the negligence of Mr. Owens' fellow servants which could not have been foreseen or expected by him, in failing to give decedent a warning by the engine bell when the engine and cars were about to move, as provided by Rule 30 of its Book of Rules hereinbefore referred to, thereby causing him when he was upon the track to be struck by the cars and mortally wounded. The decision of said Circuit Court was in direct conflict with decisions of the United States Supreme Court and decisions of other Federal Courts hereinafter referred to in brief in support of allowance of this writ.

2. That the decision of said Circuit Court of Appeals entirely ignored the evidence of petitioner that defendant's switchman Koefod failed to ascertain the

whereabouts of decedent or receive a signal from him before signaling defendant's engineman to kick the cars and the failure of defendant's enginemen to ring the engine bell as provided by Rule 30 of the Book of Rules, when the engine was about to move.

3. That said Court in its decision totally ignored the trial judge's construction of Rule 30 providing in part: "the engine bell must be rung when an engine is about to move" which was to the effect that it was a specific rule in its language adopted by the defendant governing the conduct of its employees for the purpose of safety of operation, and that it applied in yards, and the failure to obey the rule constituted negligence (R. 216, 217) which in this case was the negligence of defendant's enginemen as the duty rested with them to ring the bell (R. 199).

4. The said Circuit Court of Appeals erred in setting aside the verdict of the jury thereby refusing to allow the jury to pass upon the question of assumption of risk, and depriving petitioner of her constitutional right to trial by jury and to due process of law, and to equal protection of the laws under the 14th Amendment of the Constitution of the United States, in that the Court in its decision did not consider petitioner's evidence with reference to the practice of following the company rule and ringing the bell when the engine was about to move as given by yardman Hinkle, a co-worker of decedent, as follows: "Q. But in stopping and starting the cars you go by

the signals detailed in the Book of Rules, is that right? A. Yes, sir." (R. 114)

The undisputed evidence shows that Rule 30 is contained in the Book of Rules (R. 137-141) and it is admitted in the evidence and by the pleadings that all switching operations are done by and with the use of the switch engine (R. 3, 10), the mechanical operation of which is in the sole charge of the enginemen (R. 199).

Like testimony was given in the case of Chesapeake & O. R. Co. vs. Proffitt, 241 U.S. 462, 465; 60 L. Ed. 1102, 1105, and in such decision was considered sufficient to create a dispute in the testimony on the question there involved.

The Circuit Court of Appeal's opinion in this cause proceeds on the theory that the testimony stand uncontradicted that Rule 30 had not been construed by employees, including the decedent, for more than twenty years prior to the accident as requiring that the bell be rung in switching operations. The above testimony given by switchman Hinkle is in direct conflict with the testimony referred to in the Court's opinion.

See Kanawha & Michigan Ry. Co. vs. Kerse, etc., 239 U.S. 576; 60 L. Ed. 449, 450, wherein this Court considered evidence much more remote than in the case at bar as disputing almost conclusive evidence that decedent brakeman assumed the risk as a matter of law and held that assumption of risk was a jury

question and affirmed judgment recovered for brakeman's death.

5. The Court erred in holding that it had been the custom of company employees, including decedent, for over twenty years not to ring any bell in ordinary switching movements. The evidence without dispute is conclusively to the effect that no duty devolved on decedent to ring the engine bell but that it was the exclusive duty of the enginemen (R. 199).

6. The Court erred in holding "The existence of Company rule 30 which plaintiff urges should be construed so as to require the ringing of the engine bell even in switching movements, is immaterial on the question of whether or not decedent assumed the risk, where as here the evidence is uncontradicted that the rule had not been so construed by employees, including the decedent, for more than twenty years prior to the accident".

In such holding the Court completely ignored the literal meaning of rule 30 reading: "Engine bell must be rung when an engine is *about to move.*" Negligence charged by petitioner was failure to ring the bell of the engine as provided by the aforesaid rule, *before moving the engine and cars or where same were about to move.* The testimony of defendant's witnesses who testified on the subject tended to show the engine bell was not rung in ordinary *switching movements.* There is no testimony in the record that it was the custom or practice not to ring the bell when the engine was

about to move or immediately preceding its movement. The rule only required that the bell be rung when the engine *was about to move or immediately preceding its movement* and did not require the ringing of the bell during the actual switching movement itself.

7. The Court erred in holding that decedent gave the switching instruction and knew the cars would be kicked at any moment.

The sole testimony on this was that decedent said: "Let these cars go 13" (R. 71) and nothing more. Switchman Koefod, who gave the kick signal, only assumed this meant to kick the cars. No instruction was given to dispense with signals.

8. The Court erred in not giving effect to the rule of law as established by decisions of this Court that the burden of proving assumption of risk in cases arising under the Federal Employers' Liability Act is upon the defendant, and *whether the defense of assumption of risk is made out is a question for the jury.*

9. The Court erred in failing to note that at best the evidence was definitely conflicting, and in not permitting the jury to say in such a case under all of the evidence adduced herein whether the facts and circumstances proven established contributory negligence (which merely reduces the damages), or assumption or risk, for in some respects the two defenses blend, and in entirely ignoring the evidence of negligence contained in the record and that the danger complained of was created by the negligent act of decedent's co-

employees and was not open and obvious but arose suddenly and unexpectedly, and that decedent could have no knowledge thereof presumptive or otherwise nor did he have any time to appreciate the same.

10. The Court erred in presuming the decedent had knowledge that the switching operation would be performed without ringing the bell as provided by the rule, for the reason that under the evidence no knowledge thereof that such was the practice was brought home to the decedent, and further erred in holding, contrary to the decisions of this Court, that undisputed evidence on the question of assumption of risk became one of law for the Court and failed to apply the decisions of this Court which are to the effect that where the facts are such that reasonable minds would differ thereon, the question of assumption of risk is one for the jury.

11. The Court erred in not giving effect to the decisions of this Court that the Federal Employers' Liability Act is a remedial one, especially since the Congress has amended the law following the trend of previous decisions of this Court that the doctrine of assumption of risk has no application where the injuries or death of the employee results in whole or in part on account of the negligence of other employees of the carrier.

12. The Court erred in not giving effect to the established rule and decisions of this Court that an employee is not charged with the duty to exercise care

to discover extraordinary dangers that arise from the neglience of the employer or those for whose conduct the employer is responsible, but the employee may assume that the defendant, or its agents, have exercised proper care with respect to his safety until notified to the contrary; the Court further erred by its action in seizing upon pure technicalities to defeat the claim of this petitioner and thereby arbitrarily denied her the equal protection of the laws, and its decision if permitted to stand will deprive this petitioner as widow of deceased workman upon whom she was solely dependent for her support, of her claim under the Federal law and her rights will be forever lost.

PRAYER FOR WRIT

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honoroable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9940 Union Pacific Railroad Company, a corporation, Appellant, vs. Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, deceased, Appellee; and that said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court and the judgment

of the District Court of the United States for the Eastern District of Washington affirmed, or in the alternative that your petitioner be granted a new trial, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, Deceased, *Petitioner.*

By FRANK C. HANLEY,
Attorney for Petitioner,
1508 Yeon Building
Portland, Oregon.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Circuit Court of Appeals in its decision did not criticize in any particular the instructions or procedure followed by the District Court but reversed and dismissed the lower court's decision apparently on the broad ground that decedent had assumed the risk and no recovery could therefore be had. In so doing it is submitted that its judgment erroneously failed to consider and give effect to all of the evidence in the record and particularly that of defendant's witness Hinkle that all cars were started according to the signals detailed in the Book of Rules of which Rule 30 was one of them, or to give effect to the evidence that decedent's co-employees did not look out for him before giving a signal to kick the cars or did not obtain a signal from him before signaling the engineer to kick the cars as was the custom, which was clearly shown by the evidence, and further failed to give effect to the evidence that there was no bell rung by the enginemen when the engine was about to move as provided by Rule 30, and failed to give effect to the evidence that decedent was in charge of the switch crew and that the signals for starting and stopping the switching operations were given by him and not by his helpers.

The Court in its decision competely glossed over or paid no heed to the entire record of testimony or the fact that the evidence conclusively showed under the

decisions that defendant was guilty of negligence *per se*. The evidence clearly showed that the danger complained of was not open and obvious but was an extraordinary danger which arose suddenly and unexpectedly without knowledge or appreciation thereof by decedent which was created by the negligence of his fellow workmen. As stated, the Court ignored all of the evidence in the record by which the jury came to the conclusion under proper instructions, that the petitioner's decedent did not under the circumstances assume the risk. The Court furthermore ignored the settled proposition of law that the burden of proving the assumption of risk in cases arising under the Federal Employers' Liability Act is upon the defendant and whether *the defense of assumption of risk is made out is a question of fact for the jury*, and that the employee is not charged with the duty to exercise reasonable care to discover extraordinary dangers that may arise from the negligence of the employer or his co-employees for whose conduct the employer is responsible, but the employee may assume that the employer, or his agents, have exercised proper care with respect to his safety until notified to the contrary unless the want of care and danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate it.

In the instant case we have no obvious situation as the danger arose only from failure of the co-employees of decedent to observe the defendant's rules and arose suddenly without time or opportunity for

decedent to avoid same and without notice to him that the cars were being kicked, as a result of which he met with his death.

By the decisions of this Court in such cases, a few of the principal ones being hereinafter cited, this was a matter to be passed upon by the jury *as it was passed upon,* and the Circuit Court erred in thus substituting its judgment and decision for that of the jury on the question of assumption of risk whereby the petitioner was denied her constitutional right of a trial by jury and to the due process of law, and denied the equal protection of the laws.

At this point we invite the Court's attention to the case of *C. R. I. & P. R. Co. vs. Ward,* 64 L. Ed. 430; 252 U. S. 18 which was an action under the Federal Employers' Liability Act wherein an error was claimed on account of the failure of the Court to direct a verdict on the ground that plaintiff assumed the risk. Ward was a switchman and was suddenly thrown from the top of a box car upon which he was about to apply a brake, on account of the negligent manner in which the foreman cut the cars loose from the engine which was pushing them, causing a sudden jerk thereof and precipitating Ward to the ground. In passing on the question of assumption of risk the Court stated:

> "As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in Chesapeake & O. R. Co. v. De Atley, 241 U.S. 310, 315, 60 L. Ed. 1016, 1020, 36 Sup. Ct. Rep. 564: 'Accord-

ing to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U.S. 313. See also Chesapeake & O. R. Co. v. Proffitt, 241 U.S. 462, 468, 60 L. Ed. 1102, 1106, 36 Sup. Ct. Rep. 620; Erie R. Co. v. Purucker, 244 U.S. 320, 61 L. Ed. 1166, 37 Sup. Ct. Rep. 629.

"Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. *This situation did not make the doctrine of assumed risk a defense to an action for*

damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assume the risk."

The foregoing case is somewhat analogous to the facts in the case at bar on the question of assumption of risk in that decedent had neither warning nor opportunity to judge the danger to which he was exposed by failure of the enginemen to ring the bell or at least receive some notice that the cars were going to be summarily kicked, and in the absence thereof the decedent had a right to believe that the provisions of Rule 30 would be complied with as the evidence shows that due to lack of proper care on the part of the enginemen and co-workers while decedent was in the performance of his duty, he was suddenly struck by the cars. As held in the Ward case, *it is doubtful here if the situation made out the doctrine of assumed risk as a defense to the action.* The decision of the Circuit Court of Appeals is certainly in direct conflict with the ruling of this Court in the Ward case.

The Circuit Court of Appeals rests its decision entirely upon the case of Toledo St. L. & W. R. Co. vs. Allen, 275 U.S. 165; 72 L. Ed. 563. In such case the

plaintiff was a car checker and predicated negligence on a failure to maintain adequate space between the tracks in yards and the failure of a switch engine to ring a bell or blow a whistle to give warning of approach of a car, to plaintiff. The undisputed evidence showed that the space between the tracks was sufficient to enable plaintiff to keep out of the way of moving cars although the danger would have been less if the space were greater and that the cars which injured plaintiff were detached from the engine and that plaintiff was three or four hundred feet away from the lead track and that the engine was from 25 to 30 car lengths farther (altogether a distance of 1300 feet) and by reason of such distance the ringing of a bell or sounding of a whistle would have been of no use to plaintiff as a warning, citing Aerkfetz vs. Humphreys, 145 U.S. 418. The Court further held that spacing of tracks was an engineering question and should not be left to varying judgment of juries and for such reasons reversed judgment for plaintiff.

It will be noted that neither of these cases involved any safety rule adopted by the railroad for the ringing of a bell when the engine was about to move. There is a clear distinction in the facts of these cases and the case at bar. In the instant case Rule 30 exists which provides that *the bell shall be rung when the engine is about to move.* The engine according to the testimony was about 100 feet away (R. 55-56) from where decedent was at the switch and he was in a position where he could have heard the bell had it been

rung and it would have served as a warning to him.

The part of the Circuit Court of Appeal's opinion quoted from the Toledo case relative to assumption of risk is *obiter dictum* and was not necessary to Toledo case opinion, as a careful reading thereof indicates that the Court speaking through Justice Butler had decided before writing this portion of the opinion that there was no negligence in failure to space the tracks and that there was no negligence in the failure to ring the bell and obviously the ringing of the bell would not have been useful as a warning to plaintiff. In addition thereto the rule was applied to the case as announced in the decision of Aerkfetz vs. Humphreys, 145 U.S. 418 where no company rule was involved.

SUMMARY

I.

The decision of the Circuit Court of Appeals in reversing the verdict and judgment of the District Court is in direct conflict with the applicable decisions of Federal Courts in holding that petitioner's decedent as a matter of law had assumed the risk of stepping in front of the cars which were about to move and being struck thereby, in the face of the facts as shown by the record herein.

Chicago R. I. & P. R. Co. vs. Ward, 252 U.S. 18; 64 L. Ed. 430.

Erie R. R. Co. vs. Purecker, 244 U.S. 320; 61 L. Ed. 1166.

Chesapeake & O. R. Co. vs. DeAtley, 241 U.S. 310; 60 L. Ed. 1016.

Chesapeake & O. R. Co. vs. Proffitt, 241 U.S. 462, 466; 60 L. Ed. 1102, 1105.

N. Y. Central vs. Boulden (7th Cir.), 63 Fed. (2d) 917; Cer. denied, 289 U.S. 753; 77 L. Ed. 1491.

Rocco vs. Lehigh Valley R. Co., 288 U.S. 275; 77 L. Ed. 743.

Great Northern R. Co. vs. Leonidas, 305 U.S. 1; 83 L. Ed. 3 (affirming 72 Pac. (2d) 1007 (Mont.).

Gildner vs. Baltimore & O. R. Co. (2d Cir.), 90 Fed. (2d) 635.

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.

Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.

II.

The Circuit Court of Appeals erred in that it did not give any consideration to the undisputed evidence that the enginemen failed to ring the engine bell, as provided by Rule 30, when the engine was about to move or immediately preceding the switching movement, and completely ignored the established law, as held by the following decisions, that a railroad company rule furnishes competent evidence against itself of a proper standard of care and its violation constitutes actionable negligence.

Gildner vs. Baltimore & O. R. Co. (2d Cir.) 90 Fed. (2d) 635.

Wyatt vs. N. Y. O. & W. R. Co. (2d Cir.), 45 Fed. (2d) 705. Cer. denied, 283 U.S. 829; 75 L. Ed. 1442.

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.

Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.

Lehigh Valley R. Co. vs. Mangan, 278 Fed. 85.

Atchison T. & S. F. Ry. Co. vs. Ballard (5th Cir.), 108 Fed. (2d) 768. Cer. denied, 310 U.S. 646; 84 L. Ed. 1413.
Chicago R. I. & P. Ry. Co. vs. Ship, 174 Fed. 353.
Gr. No. Ry. Co. vs. Hooker, 170 Fed. 154.
Central R. Co. of N. J. vs. Young, 200 Fed. 359.

III.

The Circuit Court of Appeals erred in its decision in disregadding the rule of law contained in the following Federal decisions to the effect that testimony on assumption of risk in order to make it a jury question is not required to be in dispute but if the testimony is such upon which reasonable minds would differ it then becomes a jury question.

Chesapeake & O. R. Co. vs. DeAtley, 241 U.S. 310, 315; 66 L. Ed. 1016, 1020.
Erie R. Co. vs. Purucker, 244 U.S. 320; 61 L. Ed. 1166.
Chicago R. I. & P. R. Co. vs. Ward, 252 U.S. 18; 64 L. Ed. 430.
N. Y. Central vs. Boulden (7th Cir.), 63 Fed. (2d) 917; Cer. denied, 289 U.S. 753; 77 L. Ed. 1491.

IV.

The Circuit Court of Appeals erred in holding decedent assumed the risk as a matter of law for the reason that under the facts in this case it was shown that the danger arose suddenly and unexpectedly from the negligence of decedent's co-employees in failure to receive or give proper signals and he had no opportunity to know and appreciate it. Where such conditions exist the doctrine of assumption of risk is not a defense.

Chicago R. I. & P. R. Co. vs. Ward, 252 U.S. 18; 64 L. Ed. 430.

Gildner vs. Baltimore & O. R. Co. (2d Cir.), 90 Fed. (2d) 635.

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.

Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.

V.

The decision of the Circuit Court of Appeals is in direct conflict with the following Federal decisions of other circuits where the violation of the same, or a similar rule to Rule 30, was claimed as negligence and they hold without exception if the engine bell was not rung there could be no assumption of risk.

Gildner vs. Baltimore & O. R. Co. (2d Cir.), 90 Fed. (2d) 635.

Montgomery vs. Baltimore & O. R. Co. (6th Cir.), 22 Fed. (2d) 359.

Pacheco vs. New York, N. H. & H. R. R. Co. (2d Cir.), 15 Fed. (2d) 467.

Lehigh Valley R. Co. vs. Mangan (2d Cir.), 278 Fed. 91.

VI.

The Circuit Court of Appeals did not give effect to the rule of law as established by the decisions of this Court that the burden of proving the assumption of risk in cases arising under the Federal Employers' Liability Act is upon the defendant and whether the defense of assumption of risk is made out is a question for the jury.

Great No. Ry. Co. vs. Knapp, 240 U.S. 464; 60 L. Ed. 745.

Reed vs. Dir. Gen. of R. R., 258 U.S. 92; 66 L. Ed. 480.

Wright vs. Yazoo & M. V. R. Co., 197 Fed. 94; 207 Fed. 281.

Texas & N. O. R. Co. vs. Gericke, 231 S.W. 745.

VII.

The Circuit Court of Appeals in setting aside the verdict of the jury and reversing judgment when no reversible error existed, thereby refused to allow the jury to pass upon the question of assumption of risk as it should do under the law, and deprived petitioner of her constitutional right to trial by jury and to equal protection of the laws under the 14th Amendment.

St. L. & S. F. R. R. Co. vs. Brown, 241 U.S. 223; 60 L. Ed. 966.

Bower vs. C. & N. W., 96 Neb. 419; 148 N.W. 145; 241 U.S. 470; 60 L. Ed. 1107.

VIII.

The Circuit Court of Appeals was in error in not giving effect to the decisions of this Court that the Federal Employers' Liability Act is a remedial one and like all remedial legislation should have a liberal construction to advance the remedy proposed by the Congress and to correct the evils against which it was directed. "It is designed to enlarge, not to restrict, the rights of injured workmen."

Baltimore R. R. Co. vs. Branson, 128 Md. 678; 98 A. 225.

Johnson vs. So. Pac. Co., 198 U.S. 1; 49 L. Ed. 363.

Spokane & Inland Empire R. R. Co. vs. Campbell, 241 U.S. 497; 60 L. Ed. 1125.

IX.

The Circuit Court of Appeals in its decision acted in an arbitrary manner in view of its judgment of reversal, in not granting petitioner a new trial in the Court below in that it failed to give effect to the testimony contained in the record of H. H. Chapman (R. 89-92, 95-99) and E. B. Hinkle (R. 108-114), members of the crew, that it was the custom and practice when

a foreman situated as Mr. Owens was, the view of him being obstructed, to receive a signal from him before kicking the cars:

(a) failure to receive a signal to start a train when one is customarily given is recognized as common law ground of negligence.

Kurn vs. Stanfield (8th Cir.), 111 Fed. (2d) 469.

Line vs. Erie R. Co. (6th Cir.), 62 Fed. (2d) 657.

St. Louis & S. F. Ry. Co. vs. Jeffers, 276 Fed. 73.

(b) Petitioner excepted to the court's withdrawal from consideration of the jury the ground of negligence charging failure to receive a signal from decedent (R. 257) and in this we believe the Court was in error. The testimony on this negligence, however, was not withdrawn and manifest error was apparent on the face of the record and the Circuit Court had a right to consider the entire record in support of the judgment, and if error appeared whereby petitioner could be granted any relief which did not enlarge the judgment of the lower court, the Circuit Court had a right to grant same.

Smith Engineering Co. vs. Rice (9th Cir.), 102 Fed. (2d) 492. Cer. denied 307 U.S. 637; 83 L. Ed. 1519.

Texarkana vs. Arkansas, Louisiana Gas Co., 306 U.S. 188; 83 L. Ed. 598.

Morley Construction Co. vs. Maryland C. Co., 300 U.S. 185; 81 L. Ed. 593.

Alexander vs. Cosden Pipe Line Co., 290 U.S. 484; 78 L. Ed. 452.

QUOTING FROM AUTHORITIES

Referring briefly to the case of *Gildner vs. B. & O. R. Co.*, (2d Cir.), 90 Fed. (2d) 635, wherein the same rule reading *"engine bell must be rung when the engine is about to move"*, the Court construing the rule held:

> "The indiscriminate ringing of bells in a switching yard has been disapproved by the Supreme Court as tending rather to confuse than warn. (Aerkfetz vs. Humphreys, 145 U.S. 418) * * Toledo St. L. & W. R. R. Co. vs. Allen, 276 U.S. 165 * * * but the first clause of the rule required the bell only at the start * * * The convenient and safe way is to ring the bell whenever the engine moves and the rule ought to be so understood * *. We see nothing in the assertion that the plaintiff assumed the risk of being struck from behind by walking where he did. Nobody has ever been able to say just where assumption of risk ended and contributory negligence began; *but if the rule meant what we have said there could be no assumption of risk unless the bell was rung.*"

In *Montgomery vs. Baltimore & O. R. Co.* (6th Cir.), 22 Fed. (2d) 359, where the same Rule 30 was involved, the Court held:

> "Such a safety rule is, as against the defendant, substantial evidence that reasonable care requires the precaution which the rule directs; * * * its own rules furnishing competent evidence as against itself of a proper standard of care. Taft, Circuit Judge in B. & O. Ry. vs. Camp (C. C.A. 6th), 65 Fed. 952, 960. See Baldwin on Personal Injuries, Sec. 358, p. 428.

"(3) If the starting of the engine without the bell was not negligent, there was no case. *If it was, we cannot say plaintiff assumed the risk*".

Judgment for plaintiff affirmed.

In *Lehigh Valley R. Co. vs. Mangan* (Admx.), (2d Cir.), 278 Fed. 85, Mangan, a freight conductor, was working on an adjoining track alongside of the engine of his train, to see whether a defect had been removed, when his train was just starting. He was struck and injured by the engine of another train on an adjacent track. In such case a company rule similar to Rule 30 was involved (quoting from the opinion p. 90):

"That rule directed *that the engine bell must be rung * * * while passing trains on adjacent tracks.* If the rule had been obeyed, the bell on the engine which struck him would have been clanging continuously from the time the engine was nearly one-third of a mile away up to the instant it struck him. At the rate of travel—30 miles an hour—its clanging would have gone on continuously for 40 seconds before he was struck, bringing its warning nearer to him every moment and giving him ample time to step out of the path of the approaching engine, which would have required not more than the fraction of a second. * *. In going upon the west bound track under the circumstances did Mangan assume the risk of being struck by a train running over that track? *The court below was of the opinion that the doctrine of assumption of risk was not applicable to the case* * * *."

(The court then said that he would give any of defendant's requests on that subject which the counsel for plaintiff assented to. Certain instructions

were then given which were assented to and others rejected. To the rejected instructions defendant excepted and they were assigned as error. The court in passing stated):

"(5 & 6) The only negligence charged against the defendant was that it failed to give any warning of the approach of the train which killed the defendant, and especially that it violated its own private rule requiring that the engine bell should be rung while the engine was passing a train on an adjacent track. *Mangan did not assume the risk of any injury arising from the failure to obey that rule;* and any instruction as to assumption of risk should have made that fact clear. Neither do we think that under the circumstances it could properly be said that Mangan was on the track voluntarily and for his own convenience. It seems to us that he was there in the discharge of his duty and because it was necessary for him to be there."

Judgment for plaintiff affirmed.

Wyatt vs. N. Y. O. & W. R. Co., (2d Cir.), 45 Fed. (2d) 705. Certiorari denied, 283 U.S. 829; 75 L. Ed. 1442. Wyatt, a brakeman, working with train crew in making up interstate train, was injured while gathering coal for stove in warming dugout. The Court held, quoting from opinion:

"It is another question whether the defendant owed plaintiff any duty in regard to warning him of the approach of the engine. At the moment he was not doing anything in his employment, but something which concerned his own comfort and that of his fellow employees. However, the practice of gathering fallen coal for the dugout fire was of long duration—certainly long enough to charge the defendant with notice of it. The coa-

ductor told Wyatt to get coal for the fire. There was implied, if not express, permission given him to go upon the tracks for this purpose. We hold that employees who are rightfully upon the tracks are entitled to the benefit of this rule, even though not at the moment engaged in work for the company. Hence, defendant owed plaintiff the same duty of care as though he were directly engaged in moving its cars; *and a failure to sound the cautionary signal required by the rule was a violation of that duty.* It is urged that he voluntarily placed himself in a position of danger with full knowledge that the engine would shortly back down upon track 5, and therefore, was obliged to rely upon his own watchfulness to keep out of its way. Aerkfetz v. Humphreys, 145 U.S. 418, 12 S. Ct. 835, 36 L. Ed. 758; Chesapeake & Ohio Ry. v. Nixon, 271 U.S. 218, 46 S. Ct. 495, 70 L. Ed. 914; Toledo, St. L. & W. R. R. Co. v. Allen, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513. But this court is committed to the doctrine that those decisions are inapplicable when the railroad violates *its own rule requiring the ringing of the engine bell when the engine is about to move.* Pacheco v. N. Y., N. H. & H. R. R. Co., 15 F. (2d) 467 (C.C.A. 2)."

We have quoted from the above authorities for the purpose of illustrating to this Court how other Circuit Courts have construed the rule involved in the case at bar, and held that assumption of risk was not a defense, and to show the varied and different positions taken by different railroads to escape liability and avoid the operation of a standard rule which had been adopted by them as well as the Union Pacific Railroad, for the safety of their employees, and also to show the distinction between the case at bar and the case of Toledo, St. L. & W. R. R. Co. vs. Allen, 276 U.S. 165;

relied upon by the Circuit Court of Appeals in writing its decision dismissing petitioner's acton, and how other Crcuit Courts of Appeals had likewise made their distinction and held that the Toledo case did not apply where a promulgated rule was involved.

CONCLUSION

Your petitioner has endeavored to keep within the rules and limit this brief in all possible respects. Hearupon the merits will, of course, disclose more fully the erroneous decision of the Circuit Court of Appeals. We submit, however, that we have shown that petitioner's constitutional rights have been violated and that the Circuit Court's judgment is in direct conflict with the decisions of the Supreme Court and other Federal Court Circuits on similar questions and that in any event where the defense of assumption of risk (if applicable at all) is submitted to the jury under proper instructions, its verdict is conclusive on the question.

While the $10,000.00 judgment obtained in this case, of which no complaint was made of amount, may not be of great magnitude when compared to the amount involved in many of the cases heard by this Court, it is a matter of grave concern to petitioner as widow of deceased, who has lost her sole support, that her rights be protected under the Federal law and that her rights under the Constitution be preserved by this Court.

We therefore earnestly pray the Court to grant the writ that these rights may be protected.

Respectfully submitted,

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, Deceased, *Petitioner.*

By FRANK C. HANLEY,
Attorney for Petitioner,